CHOY MENG HENG & ANOR A

v.

IMMEDIATE STRATEGY SDN BHD & ANOR

HIGH COURT MALAYA, JOHOR BAHRU B
VERNON ONG LAM KIAT JC
[CIVIL SUIT NO: (MT-1) 22-628-2001]
25 FEBRUARY 2010

TORT: *Negligence - Duty of care - Damages - Defects in shophouse purchased by plaintiffs - Failure to supervise structural works - Whether second and third defendants owed duty of care to plaintiffs - Whether breached* C

The plaintiffs purchased one unit of a shop house from the first defendant. After the plaintiffs took delivery of the shop-house, the plaintiffs discovered defects in the shop house and complained to the second defendant (the consultant engineer for the project). The second defendant prepared a report on the structural defects to the shop house and attributed the defects to poor workmanship and lack of supervision. An independent report prepared by PW1 concluded that the inherent defect in the internal beams and slabs was too substantial and that it would be more feasible to demolish and reconstruct the internal beams and slab for the first and second level. The plaintiffs and the first defendant then entered into an agreement ('the rectification agreement') whereby the first defendant agreed to carry out remedial works on the shophouse. The first defendant however failed to complete the remedial works. The plaintiffs' claim herein was founded on breach of contract or alternatively in the tort of negligence. Judgment in default had been entered against the first defendant. The plaintiffs contended that the second defendant and third defendant (the consultant architect for the project) owed a duty of care to the plaintiffs to ensure that the plans for the structure of the shop-house were adequate and that the construction works were carried out in accordance with those plans. Consequent on the said breach, the plaintiffs had suffered damages including damage to the building of the shop-house, costs of rectification/remedial works, loss of use of the shophouse and financing costs incurred by the plaintiffs in the purchase of the shop-house. The issues that arose were (i) whether the second and/or third defendants owed a duty of care to the plaintiffs and (ii) if so, whether the second and/third defendants breached that duty of care. D E F G H I

Held (allowing plaintiff's claim against second defendant'; dismissing plaintiff's claim against third defendant):

(1) Both the second and third defendants were appointed by the first defendant. The second defendant provided the structural design for the project while the third defendant provided the architectural drawings for the project. Both drawings were essential blue prints for the construction of the shop house. Notwithstanding that the second and third defendants were not privy to the sale and purchase transaction between the plaintiffs and the first defendant, there was a relationship of proximity between the second and third defendants and the plaintiffs. It was fair and reasonable in the circumstances of this case to impose a duty of care on the second and third defendants. (paras 13 & 14)

(2) The second defendant qua consulting engineer was under a duty of care not only to ensure that the engineering designs and drawings were adequate and safe but under a duty to supervise the structural works so as to ensure that they were carried out in accordance with the said engineering designs and drawings. The duty of superintending the structural works however did not extend to the third defendant. In failing to supervise the structural works, the second defendant had breached his duty of care. (paras 15 & 18)

Case(s) referred to:

Caparo Industries Plc v. Dickman [1990] 2 AC 605 ***(refd)***

Dr Abdul Hamid Abdul Rashid & Anor v. Jurusan Malaysia Consultants & Ors [1999] 8 CLJ 131 HC ***(refd)***

Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***

Malaysia National Insurance Sdn Bhd v. Lim Tiok [1997] 2 CLJ 351 SC ***(refd)***

Nepline Sdn Bhd v. Jones Lang Wootton [1995] 1 CLJ 865 HC ***(refd)***

RSP Architects Planners & Engineers v. Management Corporation Strata Title No. 1075 [1999] 2 SLR 449 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3(1)

For the plaintiffs - Chang Tau Sian; M/s Henry Soong & Chang
For the 2nd defendant - Leslie Bala; M/s Othman Hashim & Co
For the 3rd defendant - Kunasegaran Nadasen; M/s Ali Zaitun & Baharudin

Reported by Suhainah Wahiduddin

JUDGMENT

Vernon Ong Lam Kiat JC:

[1] Choy Meng Heng @ Chai Min Hin and Chai Chang Wei (the plaintiffs) purchased one unit of shop-house from Immediate Strategy Sdn Bhd (the 1st defendant). TP Tay Jurutera Perunding (the 2nd defendant) is the consultant engineer for the project. Kaz Akitek (the 3rd defendant) is the consultant architect for the project. The plaintiffs' claim is for loss and damages arising from defects to the shop-house due to the 2nd and 3rd defendants' breach of contract and negligence. Judgment in default has been entered against the 1st defendant.

The Facts As Presented By The Evidence

[2] In 1997 the plaintiffs purchased one unit of 3 storey shop-house from the 1st defendant for RM495,000. The 3rd defendant certified that the shop-house was completed on 23 January 1998. The certificate of fitness for occupation was issued on 2 March 1999. After the plaintiffs took delivery of the shop-house the plaintiffs discovered defects in the shop-house and complained to the 2nd defendant.

[3] After receiving the plaintiffs' complaint the 2nd defendant conducted a number of site inspections at the shop-house. On 28 July 1999 the 2nd defendant wrote to the 1st defendant setting out the defects and recommended repair works. The 2nd defendant followed up in another letter dated 5 August 1999 to the 1st defendant detailing the repair works to be done. The 2nd defendant also prepared a report on the structural defects to the shop-house. In that report the 2nd defendant attributed the defects to poor workmanship, insufficient lead length, too far apart of lead reinforcement, insufficient reinforcement and lack of supervision.

[4] An independent report dated 27 September 1999 (exh. P1) prepared by Tan Heng Gim (PW1) for the 1st defendant opined that the distress to the structural beams and slabs of the shop-house could be contributed by insufficient reinforcement bars and poor reinforcement placement and detailing. It concluded that the inherent defect in the internal beams and slabs is too substantial probably due to their much longer span and that it would be more feasible to demolish and reconstruct the internal beams and slab for

the first and second level. On 23 December 1999 the plaintiffs and the 1st defendant entered into an agreement ('the rectification agreement') whereby the 1st defendant agreed to carry out remedial works on the shop-house. The 1st defendant failed to complete the remedial works. The shop-house is in a state of disrepair.

Plaintiffs' Case

[5] The plaintiffs' claim is founded on breach of contract or alternatively in the tort of negligence. The plaintiffs contend that the 2nd and 3rd defendants owe a duty of care to the plaintiffs to ensure that the plans for the structure of the shop-house were adequate and that the construction works were carried out in accordance with those plans (*Dr Abdul Hamid Abdul Rashid & Anor v. Jurusan Malaysia Consultants & Ors* [1999] 8 CLJ 131; *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1 FC; *RSP Architects Planners & Engineers v. Management Corporation Strata Title No. 1075* [1999] 2 SLR 449). The 2nd and 3rd defendants are jointly and severally liable as they breached that duty of care when they failed to adequately supervise the building works (*Malaysia National Insurance Sdn Bhd v. Lim Tiok* [1997] 2 CLJ 351). Consequent on the said breach the plaintiffs have suffered damages including (i) damage to the building of the shop-house; (ii) costs of rectification/remedial works; (iii) loss of use of the shop-house; and (iv) financing costs incurred by the plaintiffs in the purchase of the shop-house.

2nd Defendant's Case

[6] The 2nd defendant contends that he is not privy to the sale and purchase agreement and the rectification agreement between the plaintiffs and the 1st defendant. The 1st defendant is liable for any breach under the said agreements. The 2nd defendant is only responsible for the preparation of the engineering design and structural drawings of the shop-house. The 2nd defendant is not obliged to supervise the project works. The defects were caused by the negligence of the 1st and 3rd defendants.

3rd Defendant's Case

[7] The 3rd defendant also contends that as he is not privy to the sale and purchase agreement and the rectification agreement he is not liable for the defects. The 1st defendant is solely liable for the

breach of the said agreements. The 2nd defendant is liable for the defects as he failed to superintend the construction works for the project.

Findings Of The Court

[8] According to the report prepared by the 2nd defendant the structural defects in the shop-house were so serious that he made the following recommendations:

1) It is more feasible to demolish and reconstruct the internal main beams.

2) As the slabs, and staircases, are supported by the main beams, they will have to be demolished and reconstruct. *(sic)*

The independent report (P1) commissioned by the 1st defendant found *inter alia* that the structural defects were due to 'poor rebar placement for the slab, improper lapping of link at the side of the beam and insufficient lapping of main reinforcement bars.' It concluded that the inherent defects in the internal beams and slabs were substantial and that it would be more feasible to demolish and reconstruct the internal beams and slab for the first and second level. After the plaintiffs and the 1st defendant entered into the rectification agreement the 1st defendant carried out some rectification works which were uncompleted.

[9] Subsequently the plaintiffs engaged Cope Consultants Sdn Bhd to prepare a report (exh. P2) for the design of the re-construction of the shop-house. On Seng Hooi (PW2) who prepared P2 visited the shop-house on 31 May 2002. PW2 found that the shop-house had undergone some re-construction works but were in a state of disrepair. For example, PW2 found that (i) the structure for the entire first floor had been completely demolished and in place steel reinforcements and timber formworks for the construction of a new first floor had been installed; (ii) the concrete slab for the entire second floor had been completely demolished but the original concrete beam remained in place; and (iii) a staircase at the rear part of the shop-house had been demolished. The plaintiffs also engaged a firm of quantity surveyors to submit a report on the proposed reconstruction costs of the shop-house. The report (exh. P3) was produced by Syed Mahadzir bin Syed Ahmad (PW3) of JUBM Sdn Bhd. According to PW3 the costs of the rectification works is between RM356,033.80 and RM388,000.

[10] The main thrust of the plaintiffs' submission relates to the 2nd and 3rd defendants' breach of their duty of care. The plaintiffs contend that the 2nd and 3rd defendants owe a duty of care to the plaintiffs as the eventual purchasers of the shop-house. That duty of care includes the duty to ensure that the plans for the structure of the shop-house were adequate and the duty to supervise the construction works to ensure that the works were carried out in accordance with those plans. The structural defects in the shop-house are so serious and substantial as to warrant demolition and reconstruction works. The defects were attributed to poor workmanship and lack of supervision. On the basis of the above the principal issues to be tried are as follows:

- Whether the 2nd and or 3rd defendants owe a duty of care to the plaintiffs?
- If so, whether the 2nd and or 3rd defendants breached that duty of care?

Whether The 2nd And Or 3rd Defendants Owe A Duty Of Care To The Plaintiffs?

[11] In the law of negligence as recognised in all major commonwealth jurisdictions pure economic loss is recoverable in negligence. In Malaysia the Federal Court recognised that pure economic loss is recoverable in negligence under limited circumstances. In *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors, (supra)*. Steve Shim (CJSS) agreed with the view that the critical question is not the nature of the damage itself, whether physical or pecuniary, but whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which the plaintiff claims to have sustained. He accepted the "open ended approach" taken by the courts in Australia and Singapore that claims for pure economic loss in the law of negligence are not precluded and will depend on the facts and circumstances of each individual case; adding, however, that caution should be exercised in extending the principle in *Donoghue v. Stevenson* to new situations. On this issue Abdul Hamid Mohamad FCJ (as he then was) observed that there had only been a few judgments of Malaysian courts and all at High Court level. In three cases the claims for pure economic loss were dismissed by the trial judges because there was no injury to person or property. In two other cases Abdul Hamid Mohamad FCJ had in *Nepline Sdn Bhd v. Jones Lang Wootton* [1995] 1 CLJ 865 allowed the claim after

resorting to s. 3(1) of the Civil Law Act 1956, following and extended Hedley Byrne on the basis that there was fiduciary relationship between the parties. In the other case of *Dr Abdul Hamid Abdul Rashid v. Jurusan Malaysia Consultants (supra)* James Foong J (now FCJ) appears to base his decision to allow economic loss on his concern that otherwise "the entire group of subsequent purchasers in this country (would be left) without relief against errant builders, architects, engineers and related personnel who are found to have erred." Abdul Hamid Mohamad FCJ concluded that the decision whether to accept claims for pure economic loss in negligence in limited cases should be based on s. 3(1) of the Civil Law Act 1956 taking into consideration the local circumstances.

[12] Under English law, the general duty of care test enunciated in *Caparo Industries Plc v. Dickman* [1990] 2 AC 605 is applicable to all negligence claims, including claims for pure economic loss. Pursuant to this test three questions have to be addressed, namely (i) was the damage suffered by the plaintiffs foreseeable; (ii) was the relationship between the plaintiffs and the 2nd and 3rd defendants sufficiently proximate; and (iii) is it fair and reasonable to impose a duty of care (see *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors, (supra)* at 17 & 18). In this case the structural defects were attributed to poor workmanship and lack of supervision. Both the 2nd defendant and PW1 concurred that the defects in the shop-house are so serious and substantial that it would be more feasible to demolish and reconstruct the internal beams and slabs for the first and second level. As the 1st defendant reneged on its promise to carry out demolition and remedial works the shop-house has been left in a state of disrepair. Consequently, the damages suffered by the plaintiffs include the costs of demolition and remedial works and the loss of use of the shop-house. In the premises the damages are foreseeable as they flow from the structural defects in the shop-house which render it unfit and unsafe for occupation.

[13] The plaintiffs purchased the shop-house from the 1st defendant. The 2nd defendant is the consultant engineer for the project whilst the 3rd defendant is the consultant architect for the project. Both the 2nd and 3rd defendants are appointed by the 1st defendant. The 2nd defendant provided the structural design for the project. The 3rd defendant provided the architectural drawings for the project. Both drawings are essential blueprints for the construction of the shop-house. Notwithstanding that the 2nd and

A 3rd defendants are not privy to the sale and purchase transaction between the plaintiffs and the 1st defendant, there is a relationship of proximity between the 2nd and 3rd defendants and the plaintiffs.

[14] Given that the damages are foreseeable and that there exists
B a relationship of proximity between the plaintiffs and the 2nd and 3rd defendants, is it fair and reasonable in the circumstances of this case to impose a duty of care on the 2nd and or 3rd defendants. The plaintiffs are the end-purchasers of the shop-house. The shop-house was constructed according to the drawings provided by the
C 2nd and 3rd defendants. As professionals the 2nd and 3rd defendants were alone responsible for their respective drawings. They undertook the obligation to provide drawings so as to ensure that the shop-house would be a proper and safe structure. They knew or ought to have known that that if they were negligent in their
D drawings the consequential defects could lead to expensive rectification work and economic loss for the plaintiffs. For the reasons adumbrated the court finds that the 2nd and 3rd defendants are under a duty of care to ensure that their drawings were properly designed for a proper and safe shop-house.

E **[15]** Are the 2nd and or 3rd defendants also under a duty of care to supervise the construction of the shop-house to ensure compliance with the specifications of the drawings? The 2nd defendant asserts that he is not the superintending officer ('SO') for
F the project. The 2nd defendant also said that his duty does not extend to the supervision of the work done at the project site. On the other hand, the 3rd defendant asserts that structural works fall within the scope of the 2nd defendant; it is for the 2nd defendant to supervise and ensure that the contractor carries out the work
G according to specifications and the engineering drawings. The 3rd defendant's evidence is corroborated by On Seng Hooi (PW2) a consulting engineer who said that site supervision is part and parcel of the scope of works of a consulting engineer and that it is required by the board of engineers. This is to ensure that the
H construction works are in accordance with the engineering design and drawings. PW2 also said that consulting engineers are supposed to have full time site representative - a resident engineer or clerk of works. The 3rd defendant said that even though he is the SO the 2nd defendant is responsible to make sure that the structural works
I was carried out according to the 2nd defendant's specifications and structural drawings. The 3rd defendant relied on the 2nd defendant's certification that the structural works have been completed in

accordance with the structural drawings. On the evidence as a whole the court finds that the 2nd defendant qua consulting engineer is under a duty of care not only to ensure that the engineering designs and drawings are adequate and safe but under a duty to supervise the structural works so as to ensure that they are carried out in accordance with said engineering designs and drawings. The duty of superintending the structural works however, does not extend to the 3rd defendant.

Whether The 2nd And Or 3rd Defendants Breached That Duty Of Care?

[16] The 2nd defendant contends that he was engaged to provide structural drawings for the project and that he carried out his duties according to his scope of work. He said that he did not supervise the construction works as he is not the SO. As the structural defects were due to poor workmanship, it is the contractor's responsibility; ultimately the 1st defendant is responsible. There was nothing that he could have done to ensure that the contractor did their job properly. Under cross-examination the 2nd defendant said that his scope of works is set out in his letter of appointment but he did not produce that letter of appointment. He also agreed that the defects were due to poor workmanship and lack of supervision. It is also evident the 2nd defendant's role was not merely limited to determining the cause of the defects after hacking the concrete sections to expose the reinforcement bars. His testimony is also inconsistent as in his evidence in chief he said that he did not know what exactly caused the defects.

[17] PW2 said that under normal circumstances site supervision is part and parcel of the scope of works of a consulting engineer. Under cross-examination PW2 explained that this is to ensure that the construction is done according to the engineering design and drawings and that this is a requirement by the board of engineers. PW2 also said that normally the clerk of works is appointed by the consultant but reimbursed by the developer. In some instances, the developer could engage a clerk of works which is seconded to the consulting engineer.

[18] The 3rd defendant relied on the 2nd defendant to certify that the structural works have been completed in accordance with the structural drawings. He said that structural works should be supervised by the 2nd defendant. The 2nd defendant admitted in evidence that the supervision was carried out by the clerk of works

who was employed by the 1st defendant. There is no evidence to show that the clerk of works reported to the 2nd defendant on the structural works. The 2nd defendant did not carry out any supervision of the structural works. When the defects were first brought to light by the plaintiffs, the 2nd defendant was the first person to investigate the shop-house and draw up a report. The 2nd defendant was also the first person to proceed with the hacking of the concrete sections in order to ascertain the cause of the defects. All these points to the fact that the 2nd defendant was the party entrusted with the responsibility of ensuring that the structural works were properly executed; and in order to discharge that duty of care the 2nd defendant ought to have supervised the structural works either directly or through the clerk of works. In failing to supervise the structural works the 2nd defendant breached his duty of care.

[19] For the foregoing reasons the plaintiff's claim against the 3rd defendant is dismissed with costs. The plaintiff's claim against the 2nd defendant is allowed on the following terms:

(a) Damages for loss of use and costs of rectification works to be assessed by the deputy registrar;

(b) Interest at 8% per annum on the damages assessed calculated from 26 November 2001 to date of satisfaction;

(c) costs to be taxed unless otherwise agreed.